

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MATT PETROLEUM CORPORATION	:	ORDER
	:	DTA NO. 812104
for Redetermination of a Deficiency or for	:	
Refund of Petroleum Business Tax under Article	:	
13-A of the Tax Law for the Years 1988, 1989 and 1990.	:	

Petitioner, Matt Petroleum, Inc., Leland Avenue, Utica, New York 13503, filed a petition for redetermination of a deficiency or for refund of petroleum business tax under Article 13-A of the Tax Law for the years 1988, 1989, and 1990.

On August 5, 1993 the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.5(b)(5). On August 31, 1993 the Division of Taxation, by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), submitted documents in support of dismissal. Thereafter, on September 3, 1993 petitioner, by its president John L. Matt, Jr., submitted documents and comments in response. After due consideration of the documents and comments submitted, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, issues the following order.

ISSUE

Whether petitioner timely protested a notice and demand for payment assessing petroleum business tax due for the years 1988, 1989 and 1990.

FINDINGS OF FACT

Petitioner, Matt Petroleum Corporation ("Matt"), operates as a distributor of petroleum products. John L. Matt, Jr., is petitioner's president.

On September 19 and 24, 1991 a valid power of attorney was respectively, signed and witnessed, granting authority to Michael J. Spohn to represent Matt in connection with an audit conducted by the Division of Taxation ("the Division") concerning the taxes at issue herein.

On March 24, 1992 a second power of attorney was executed, also valid, giving authority to Guy J. Graziano to represent Matt in the same matter mentioned above. This power of attorney states, "All Powers of Attorney heretofore filed or granted for this purpose are hereby revoked."

On April 27, 1992 a Notice and Demand for Payment of Tax Due was issued to Matt in the amount of \$102,865.00, plus penalty and interest of \$73,531.17, for the years 1988, 1989, and 1990. Petitioner requested a conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") and, on October 21, 1992 a Conciliation Conference was held at 333 East Washington Street, Syracuse, New York.

On January 15, 1993 the conferee issued a Conciliation Order denying petitioner's request and sustaining the Division's April 27, 1992 notice and demand. In this order, the conferee noted that "[Matt Petroleum] appeared by John Matt, President" at the conference. No mention is made of either Mr. Spohn or Mr. Graziano.

Included as part of the record herein is an affidavit made by Michael J. Spohn, wherein he states that he, along with John Matt, was present at the conciliation conference. However, this affidavit does not indicate whether or not Mr. Graziano was present.

Petitioner also included an affidavit made by John L. Matt, Jr., accompanied by a copy of a letter dated January 20, 1993 (five days after the alleged date of issuance of the Conciliation Order). Mr. Matt's affidavit asserts that the January 20, 1993 letter was written by Guy J. Graziano to the Director of BCMS. The letter reads as follows:

"The purpose of this correspondence is to advise you that I no longer represent Matt Petroleum Corporation (taxpayer). On or about June 15, 1992, your office granted me special permission to represent the taxpayer. A power of attorney (Corporate) has been on file with New York State since March 24, 1992.

"Please take whatever steps your office deems necessary to nullify the power of attorney appointing me as the representative of the taxpayer."

In his affidavit, Mr. Matt reiterates the information contained in the letter, agreeing that "Mr. Graziano released himself on January 20, 1993."

On June 1, 1993 Mr. Spohn submitted, by registered mail, a written offer-in-compromise to the conciliation conferee, on behalf of petitioner. The conferee, in turn, referred

the offer to the Tax Compliance Division.

By a letter dated June 3, 1993 the Division responded to Mr. Spohn's offer as follows:

"Please be advised that it is after careful review that I must deny your request. The State has very strong guidelines concerning Offers In Compromise and you clearly do not meet the criteria. A taxpayer must be out of business, completely destitute, bankrupt, and have no hope for future earnings. This is not the case in this instance. Matt Petroleum has had a minimum of \$500,000.00 in gross sales the past few years and per the information you submitted, over \$700,000.00 in assets."

On July 1, 1993 the Division of Tax Appeals received, by Federal Express, a petition challenging the Conciliation Order sustaining the Division's notice and demand. The petition states that the conciliation conferee did not send a copy of the Conciliation Order to the representative originally designated by petitioner, Michael J. Spohn. Furthermore, petitioner alleges that Mr. Graziano, who did receive a copy of the order, did not communicate this information to Mr. Spohn.

By letter dated August 5, 1993, the Division of Tax Appeals advised petitioner as follows:

"You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

"Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within 90 days from the date a Conciliation Order is issued.

"The Conciliation Order was issued on January 15, 1993 but the petition was not filed until July 1, 1993 or one hundred and sixty-seven days later.

"Pursuant to section 3000.5(b)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments."

Copies of this notice were sent to the Division and to Michael J. Spohn. The letter to petitioner, sent c/o John Matt, noted that the Division of Tax Appeals had not received a power of attorney for Mr. Spohn, and that until such document was submitted, no further information concerning this matter would be provided to Mr. Spohn.

On August 31, 1993 the Division of Tax Appeals received the Division's written comments concerning the Notice of Intent to Dismiss. Included therein were affidavits made by Joseph Chyrywaty and by Daniel B. LaFar, a copy of the Division's Certified Mail Record for

January 15, 1993, a copy of the Conciliation Order dated January 15, 1993, and a copy of Guy J. Graziano's power of attorney, as on record with the Division.

On September 3, 1993 the Division of Tax Appeals received from petitioner its written comments, which included the affidavits of John Matt and Michael Spohn, the copy of Guy J. Graziano's letter of January 20, 1993, and a copy of Michael Spohn's power of attorney signed September 19, 1991, and witnessed September 24, 1991.

Joseph Chyrywaty is the Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services. His affidavit sets forth the routine procedures followed in the ordinary course of business of BCMS in the preparation and mailing of conciliation orders. Attached to his affidavit are two exhibits denominated "A" and "B". Exhibit "A" consists of a two-page BCMS certified mail record, bearing the date January 15, 1993. Exhibit "B" is a copy of the one-page Conciliation Order issued in this matter and dated, as noted previously, January 15, 1993.

The Chyrywaty affidavit states that all conciliation orders mailed within the United States are sent by certified mail. BCMS prepares and maintains Certified Mail Records ("CMR's") which reflect a listing of all taxpayers to which conciliation orders are sent by certified mail on each particular day.¹

More specifically, as a regular part of the procedure of preparing conciliation orders for mailing, a clerk in BCMS verifies the names and addresses of taxpayers who are listed on the CMR. A certified mail control number is assigned to each Conciliation Order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer. The clerk records on the CMR the certified control number from each envelope next to the appropriate taxpayer's name.

Each page of the CMR is a separate and individual CMR for the conciliation orders listed on that page only, and each page contains spaces to record the "Total Number of Pieces Listed

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Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

by Sender", and the "Total Number of Pieces Received at Post Office". There is also a space on each individual CMR for the receiving postal employee to sign, in acknowledgment of receipt. After the postal employee signs and/or affixes the postmark acknowledging receipt on the particular date, the CMR is returned to BCMS and maintained in the regular course of business as a permanent record.

Daniel B. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mail room. Mr. LaFar's duties include the supervision of Mail Room staff in delivering outgoing Division mail to branch offices of the United States Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the Mail Room in the regular course of business, and which allegedly were followed, in particular, on January 15, 1993.

More specifically, documents, including conciliation orders, which are placed in the "Outgoing Certified Mail" basket in the Mail Room, are retrieved by a Mail Room employee and are weighed and sealed, and postage and fees are affixed. Postage and fee amounts are then recorded on the CMR. A Mail Room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the Mail Room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. A postal employee, in turn, affixes his or her signature and/or a postmark to the CMR acknowledging receipt of the items of certified mail recited therein. After the CMR has been signed and/or stamped by the United States Postal Service, it is returned the following day to the originating office within the Division (here BCMS).

The two-page CMR attached as Exhibit "A" to the Chyrywaty affidavit shows the addresses of conciliation orders mailed on January 15, 1993. The certified control numbers on the CMR run consecutively. On page two of this CMR, it shows that an envelope bearing certified control number P147439974 was addressed to Matt Petroleum Corporation, Leland Avenue, P.O. Box 536, Utica, N.Y. 13503. This CMR also shows that a second envelope

bearing certified control number P147439975 was addressed to Guy J. Graziano, Sr., 75 Richland Drive, Berkeley Heights, N.J. 07922. Page one of this CMR indicates that 13 items of mail containing conciliation orders were delivered to the United States Postal Service for certified mailing. Page two of this CMR shows that eight additional pieces of certified mail containing conciliation orders were delivered and accepted for mailing by the United States Postal Service. Both pages of this CMR bear a January 15, 1993 postmark affixed by the Roessleville Branch of the United States Postal Service and both pages contain the signature of the postal employee acknowledging the receipt and acceptance of the items of certified mail recited therein. Although the names and addresses of Matt Petroleum and Mr. Graziano are present on the CMR, there is no indication of any conciliation order addressed to Michael J. Spohn for that particular day.

The LaFar affidavit affirms that on January 15, 1993, an employee of the Mail Room delivered eight sealed postpaid envelopes for delivery by certified mail to the Roessleville Branch of the United States Postal Service, in Albany, New York. These envelopes included two pieces of certified mail (bearing Certified Nos. P147439974 and P147439975) addressed to petitioner at Leland Avenue, P.O. Box 536, Utica, N.Y. 13503 and to Guy J. Graziano, Sr., at 75 Richland Drive, Berkeley Heights, N.J. 07922, respectively.

OPINION

A. Tax Law § 170.(3-a)(e) states:

"A conciliation order shall be rendered within thirty days after the proceeding is concluded and such order shall, in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued, notwithstanding any other provision of law to the contrary" (Tax Law § 170.[3-a][e]).

The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170.3-a[e]; see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989). If the Division provided notice to petitioner through proper mailing of the Conciliation Order on January 15, 1993, then April 15, 1993 was the last day petitioner

could have timely filed a petition with the Division of Tax Appeals. After April 15, the Division of Tax Appeals would be without jurisdiction to address the merits of petitioner's case.

If, however, the Division did not provide proper notice to petitioner, due to a failure to send a copy of the Conciliation Order to petitioner's legal representative, then the statutory 90-day period would have been tolled, and the filing of a petition on July 1, 1993 would not be untimely (see, Matter of Multi Trucking, Tax Appeals Tribunal, October 6, 1988, citing Matter of Bianca v. Frank, 43 NY2d 168, 401 NYS2d 29, 31).

B. Where the timeliness of a protest is at issue, the Division bears the burden of proof to demonstrate the proper mailing of the document protested (in this case, the Conciliation Order) which begins the running of the 90-day statutory period (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991). The Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

C. The evidence submitted by the Division establishes that the Conciliation Order at issue in this proceeding was mailed to petitioner and to Mr. Graziano on January 15, 1993. The Division has offered proof to establish such mailing date by explaining its standardized mailing procedures, and also by providing direct documentary evidence to show that the particular Conciliation Order in question was delivered to the Postal Service for mailing on the date in question. The information contained in the certified mailing record (which bears the January 15, 1993 Postal Service date stamp on its first and last pages) is consistent in all respects with the information carried on the face of the Conciliation Order at issue. This certified mailing record, when coupled with the LaFar and Chyrywaty affidavits (which detail the Division's standard mailing procedures) serve as direct documentary evidence confirming the January 15, 1993 date of mailing of said Conciliation Order (see, Matter of Novar TV & Air Conditioner Sales & Serv., *supra*; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). In fact, the presence of the date stamp of the Postal Service on the same page as appears the

information regarding the Conciliation Order issued to Mr. Graziano and to petitioner directly supports the conclusion that mailing of said document occurred as claimed by the Division (Matter of Katz, supra).

It should be noted, as well, that petitioner does not dispute the date of issuance of the Conciliation Order (January 15, 1993), nor deny that both John Matt, Jr., as president of petitioner, and Guy Graziano received a copy of the Conciliation Order. The reproduction by petitioner in the evidence which it submitted of both the letter of Mr. Graziano (citing the number assigned to the conciliation order by BCMS, i.e. CMS No. 122708) and the order itself lend additional support for the Division's position on this point.

D. As noted in Conclusion of Law "A", where a Conciliation Order has been properly mailed (as the Division has shown in this matter), a petition must be filed with the Division of Tax Appeals within 90 days from the date the Conciliation Order is issued. The Rules of Practice and Procedure of the Tax Appeals Tribunal for the Division of Tax Appeals provide that where any document required to be filed under any provision of Article 40 of the Tax Law is sent by courier, delivery, messenger, or similar services, the date of delivery will be deemed to be the date of filing (20 NYCRR 3000.16[a][1]; see, Matter of Rubo Sales Corp., Tax Appeals Tribunal, February 25, 1993). Here, the only petition received by the Division of Tax Appeals was sent by Federal Express, and was delivered to the Division of Tax Appeals, and hence deemed filed, on July 1, 1993. Petitioner does not dispute such date of receipt.

Applying these rules to the facts of this case, as noted above, April 15, 1993 was the last day petitioner could have timely filed a petition with the Division of Tax Appeals. Accordingly, this petition was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case, unless petitioner's argument that the Division failed to serve a copy of the Conciliation Order to its properly authorized representative is accepted and serves to toll the 90-day period (see, Matter of Multi Trucking, supra).

E. CPLR 2103(b) outlines the proper procedure for the service of papers:

"Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney" (CPLR 2103[b]).

This principle has been further clarified by the Court of Appeals in Matter of Bianca v. Frank (43 NY2d 168, 401 NYS2d 29, 31):

"[O]nce a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf. This is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified (see, e.g., CPLR 2103, subd. [b]; 7506, subd. [d]; Executive Law, § 168; Administrative Procedure Act, § 307)."

The Tax Appeals Tribunal, as well, has recognized in Matter of Multi Trucking (*supra*), that the 90-day period for the filing of a petition must be tolled where petitioner's representative has not been served with the necessary documents (*citing Matter of Bianca v. Frank, supra*).

F. Petitioner asserts that at the time of the issuance of the Conciliation Order, Michael Spohn, and not Guy Graziano, was its duly appointed representative, and that, consequently, its right to have its agent properly notified was not observed. Both Mr. Spohn's and Mr. Graziano's powers of attorney were valid at the time of their execution. 20 NYCRR 2390.1(b) squarely addresses such an issue of conflicting powers of attorney:

"(b) In any case in which a power of attorney has been filed and thereafter the taxpayer desires to authorize an additional or a new attorney or agent to represent him in the same proceeding, a new power of attorney must be filed revoking any and all powers of attorney previously filed with respect to the same proceeding. The revocation of the authority of the former attorney or agent shall not be effective so far as the Department of Taxation and Finance is concerned until notice, that the authority of such attorney or agent has been revoked and that the former attorney or agent has been notified in writing by the taxpayer of such revocation, is received by the Department of Taxation and Finance" (Emphasis added.)

The latter executed power of attorney signed by Guy Graziano clearly states on its face that "All Powers of Attorney heretofore filed or granted for this purpose are hereby revoked", seemingly terminating Michael Spohn's authority to act on petitioner's behalf.

Under the regulation above, however, this revocation would not be valid unless the Division received notification that Mr. Spohn had been informed in writing of such action by

petitioner (see, Matter of Coliseum Palace, Tax Appeals Tribunal, November 17, 1988). No evidence was presented by the Division that this notification requirement was observed. On the other hand, no contention has been made by petitioner that it was not.

However, it is of no ultimate consequence whether Michael Spohn was aware of any potential effect on his authority of the execution of the later power of attorney to Guy Graziano. Assuming arguendo that Mr. Spohn's power of attorney was not effectively revoked, because he was not informed, the regulation does not say that the second power of attorney to Mr. Graziano would have been invalidly executed as a result. (Presumably, in such a circumstance, the result would be the exact situation that the regulation was apparently intended to prevent, i.e., conflicting powers of attorney.)

G. In the event that a petitioner has more than one representative, only one may be designated to receive copies of communications and notices (20 NYCRR 2390.5[a]). Therefore, the Division was not under any obligation to notify both agents (assuming they were both properly authorized). In order to prevail on its argument that the Division had to provide notice to Michael Spohn, petitioner would have to show two things: (1) that the Division had notice prior to issuance of the Conciliation Order that Guy Graziano's power of attorney had been revoked, and (2) that Michael Spohn's power of attorney remained valid.

As to the first point, if Mr. Graziano was still a properly authorized agent of petitioner at the time of the issuance of the Conciliation Order, then the Division fulfilled its obligations when it served him with a copy of the order. There is scant evidence as to who was present at the conciliation conference, and what powers of attorney, if any, were presented to the conferee at that time. No evidence has been produced that Guy Graziano's authority had ceased prior to January 20th (five days after issuance of the Conciliation Order). Mere non-appearance at a conference, if such was the case, is not conclusive evidence that Mr. Graziano was no longer petitioner's legal representative. Indeed, John Matt's affidavit indicates that Mr. Graziano did not "release himself" until January 20, 1993. If Mr. Graziano had relinquished his authority prior to this point, then sending a copy of the order to him was more than was required of the

Division, under the circumstances, not less.

As to the second point, even assuming, arguendo, that Mr. Graziano's power of attorney had been effectively terminated prior to issuance of the order, such would not automatically revive the prior power of attorney to Mr. Spohn, if it also had been revoked. A new power of attorney would have to have been executed in favor of Michael Spohn, and there is no indication that this occurred. Comparing Mr. Spohn's affidavit as to who was present at the conference (i.e., John Matt, the Division's representative, the conferee, and himself), with the conferee's statement (in the conciliation order) that petitioner appeared "pro se", by its president, John Matt, leaves the matter of who was present unclear. In any event, Michael Spohn's appearance at the conference, if such was the case, is not conclusive evidence that he was petitioner's authorized agent (Matter of Coliseum Palace, supra).

This case is similar to Matter of Sliford Restaurant (Tax Appeals Tribunal, October 10, 1991), where the petitioner failed to prove that its asserted representative was actually its legal representative during the determinative period of time. The Tribunal found that the Division's failure to send this party a copy of the notice of determination issued to petitioner did not toll the running of the statutory time limitation. Petitioner, in the case at bar, has not addressed the plain language of 20 NYCRR 2390.1(b) (and the power of attorney itself) which clearly states that all prior powers of attorney are revoked by the filing of subsequent powers of attorney. Neither has petitioner shown, or even asserted, that neither Mr. Spohn nor the Division had the proper notification, such that the revocation of Mr. Spohn's power of attorney was ineffective.

In sum, petitioner has not established that Guy Graziano was not its proper representative, such that serving a copy of the Conciliation Order on him was insufficient to satisfy CPLR 2103. Nor has petitioner established that Michael Spohn was its only legal representative (or its legal representative at all), such that the Division was required to serve a copy of the Conciliation Order on him under CPLR 2103. Therefore, petitioner's argument fails, the 90-day period for filing of the petition has not been tolled, petitioner's July 1, 1993 petition was untimely, and the Division of Tax Appeals lacks jurisdiction to review it on its merits.

H. It is ordered that the petition of Matt Petroleum Corporation be, and the same is hereby dismissed.

DATED: Troy, New York
October 21, 1993

/s/ Daniel J. Ranalli
ASSISTANT CHIEF
ADMINISTRATIVE LAW JUDGE